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Nos. 07-1090 and 08-539

In the Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER

v.

JORDAN BEATY, ET AL.

REPUBLIC OF IRAQ, ET AL., PETITIONERS

v.

ROBERT SIMON, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Republic of Iraq continues to be amenable to suit under the exception to foreign sovereign immunity contained in 28 U.S.C. 1605(a)(7).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 8
Argument:
I. The President made FSIA Section 1605(a)(7) inapplicable to Iraq pursuant to EWSAA Section 1503 10
   A. Under the EWSAA's plain terms, the President had authority to render Section 1605(a)(7) inapplicable to Iraq 11
      1. Section 1605(a)(7) unquestionably qualifies as a "provision of law that applies to countries that have supported terrorism" 11
      2. No canon of construction warrants imposing unstated limitations onto Section 1503 13
      3. Temporal considerations do not justify departing from the EWSAA's plain text 19
   B. Even if Section 1503 were not clear, the President's reasonable construction is entitled to great deference 22
II. The NDAA has no effect on the courts' jurisdiction over respondents' claims 25
   A. The NDAA has no effect on the courts' jurisdiction over respondents' claims because the President waived the NDAA with respect to Iraq 26
   B. NDAA Section 1083(c)(4)'s characterization of the scope of the President's authorities under EWSAA Section 1503 is entitled to no weight 28

Table of Contents—Continued: Page

C. Although rendered inapplicable to Iraq, Section 1605(a)(7) remains available as a basis for jurisdiction over suits against other designated states pending before the NDAA's enactment 30
Conclusion 33
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Acree v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), cert. denied, 544 U.S. 1010 (2005) ..... *passim*
Alaska v. *United States*, 545 U.S. 75 (2005) 14
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 24
American Well Works Co. v. *Layne & Bowler*, 241 U.S. 257 (1916) 31
Andrus v. *Sierra Club*, 442 U.S. 347 (1979) 24
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983) ... 30
Chevron U.S.A. Inc. v. *NRDC*, 461 U.S. 574 (1983) 23
Daliberti v. *Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) 7
Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 23
Jama v. *ICE*, 543 U.S. 335 (2005) 23
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 13
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 29
Regan v. *Wald*, 468 U.S. 222 (1984) 23
Republic of Austria v. *Altmann*, 541U.S. 677 (2004) 21

Cases—Continued: Page

Republic of Mexico v. *Hoffman*, 342 U.S. 30 (1945) 19
Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 2, 22
United States v. *Curtis-Wright Export Co.*, 299 U.S. 304 (1936) 18, 19
United States v. *Dickerson*, 310 U.S. 554 (1940) 18
United States v. *Gonzales*, 520 U.S. 1 (1997) 11
United States v. *Monsanto*, 491 U.S. 600 (1989) 12
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 29
United States v. *Will*, 449 U.S. 200 (1980) 18

Constitution, agreement, statutes and regulations:

U.S. Const. Art. I, § 7 28
Cl. 2 28
Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Nov. 17, 2008, Art. 26(1)(b) <http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf> 22
Act of Apr. 30, 1994, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459 15
Act of Oct. 25, 1999, Pub. L. No. 106-79, 113 Stat. 1212:
§ 9001(a), 113 Stat. 1283 20
§ 9001(c), 113 Stat. 1283 20
Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 196 13

Statutes and regulations—Continued: Page

Act of Nov. 6, 2003, § 2204(2), 117 Stat. 1230 29
Act of May 11, 2005, Pub. L. No. 109-13, Div. A, § 2101, 119 Stat. 266 21
Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559 3
§ 1503, 117 Stat. 579 . . . . . *passim*
§ 2105, 117 Stat. 589 18
Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*:
50 U.S.C. App. 2405(j) (2000 & Supp. V 2005) (§ 6(j)) 2, 12
50 U.S.C. App. 2405(j)(1)(A) (2000) (§ 6(j)(1)(A)) 2
Foreign Assistance Act of 1961, 22 U.S.C. 2151 *et seq.*:
22 U.S.C. 2152c(a)(4)(B)(i) 13
22 U.S.C. 2227 (2000) (§ 307) 14, 15, 21
22 U.S.C. 2371 (§ 620A) 1, 2, 12, 15, 22
22 U.S.C. 2371(a) 2
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 2
28 U.S.C. 1604 2
28 U.S.C. 1605-1607 2
28 U.S.C. 1605(a)(2) 24
28 U.S.C. 1605(a)(7) . . . . . *passim*
28 U.S.C. 1605(a)(7)(A) 2, 12, 21
28 U.S.C. 1605A (Supp. II 2008) . . . 8, 21, 27, 31, 32, 33
28 U.S.C. 1605A(c) (Supp. II 2008) 31, 32

Statutes and regulations—Continued: Page

28 U.S.C. 1610(a)(2) 24
International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 555, 99 Stat. 227 16
Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, §§ 586-586J, 104 Stat. 2047:
§ 586F, 104 Stat. 2051 16
§ 586F(c), 104 Stat. 2051 . . . . . 15, 16
§ 586F(c)(1), 104 Stat. 2051 . . . . . 3, 15
§ 586F(c)(2), 104 Stat. 2051 15
Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(a)(1), 122 Stat. 3000 21
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3:
§ 1083, 122 Stat. 338 . . . . . 8, 9, 10
§ 1083(a)(1), 122 Stat. 343 (to be codified at 28 U.S.C. 1605A (Supp. II 2008)) 31
§ 1083(b)(1)(A)(iii), 122 Stat. 341 26
§ 1083(c), 122 Stat. 342 30
§ 1083(c)(1), 122 Stat. 342 . . . . . 8, 30, 31, 32, 33
§ 1083(c)(2), 122 Stat. 342 . . . . . 31, 33
§ 1083(c)(2)(A), 122 Stat. 342 33
§ 1083(c)(2)(A)(iii), 122 Stat. 342 31
§ 1083(c)(2)(B)(ii), 122 Stat. 343 32
§ 1083(c)(2)(C), 122 Stat. 343 31
§ 1083(c)(3), 122 Stat. 343 31
§ 1083(c)(3)(A), 122 Stat. 343 31
§ 1083(c)(3)(B), 122 Stat. 343 31
§ 1083(c)(4), 122 Stat. 343 . . . . . 28, 29

Statutes and regulations—Continued: Page

§ 1083(d), 122 Stat. 343 7
§ 1083(d)(1), 122 Stat. 343 . . . . . 7, 26, 28
§ 1083(d)(4), 122 Stat. 343 7
7 U.S.C. 6506 18
8 U.S.C. 1735 . . . . . 2, 13
10 U.S.C. 2327(b) 2
15 U.S.C. 7410(b) 2
26 U.S.C. 901(j)(2)(A)(iv) 2
28 U.S.C. 1331 32
Exec. Order No. 13,290, 3 C.F.R. 192 (2004) 4
Exec. Order No. 13,303, 3 C.F.R. 228 (2004) 4, 5, 24

Miscellaneous:

154 Cong. Rec. E47 (daily ed. Jan. 17, 2008) 27
55 Fed. Reg. 37,793 (1990) 2
69 Fed. Reg. 61,702 (2004) 4
Export and Reexport Controls for Iraq, 69 Fed. Reg. 46,070 (2004) 20
H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. (2003) 19, 20, 21, 27
Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007) 6, 7, 25, 28
Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003) 4, 10, 17, 23, 29

Miscellaneous–Continued: Page

National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong., 1st Sess. (2007) 6, 7, 25, 28
Presidential Determination No. 2003-23, 3 C.F.R. 320 (2004) 3, 19, 20, 22, 24, 25
Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (2008) 7, 26, 27
S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) 5
S.C. Res. 1859, U.N. Doc. S/RES/1859 (Dec. 22, 2008) . . . 22
Webster's Third New International Dictionary (1976) 12

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INTEREST OF THE UNITED STATES

This case presents the question whether the President validly made inapplicable to Iraq a statute abrogating foreign sovereign immunity for designated state sponsors of terrorism. At the Court's invitation, the United States filed a brief supporting certiorari in No. 07-1090.

STATEMENT

1. Congress has imposed numerous sanctions on countries that support international terrorism. Section

620A of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. 2371, and Section 6(j) of the Export Administration Act of 1979 (EAA), 50 U.S.C. App. 2405(j), forbid foreign assistance and restrict exports to countries that the Secretary of State has determined have "repeatedly provided support for acts of international terrorism." 22 U.S.C. 2371(a); 50 U.S.C. App. 2405(j)(1)(A). The range of sanctions that flow from designation as a state sponsor of terrorism include the denial of visas, 8 U.S.C. 1735, military contracts, 10 U.S.C. 2327(b), fellowships, 15 U.S.C. 7410(b), and tax credits, 26 U.S.C. 901(j)(2)(A)(iv).

In 1996, Congress adopted the sanction at issue in this case—the abrogation of designated states' immunity from terrorism-related claims. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. 1604, subject to specifically enumerated exceptions, 28 U.S.C. 1605-1607. As originally enacted, the FSIA contained no exception to immunity for human rights violations, including torture. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 362-363 (1993). In 1996, Congress abrogated that immunity for claims involving "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" but only by a "state sponsor of terrorism" designated under EAA Section 6(j) or FAA Section 620A. 28 U.S.C. 1605(a)(7)(A).

2. In September 1990, Iraq was designated a state sponsor of terrorism pursuant to EAA Section 6(j). 55 Fed. Reg. 37,793. As a consequence, Iraq became subject to the full panoply of sanctions identified above, including, after 1996, the abrogation of immunity from claims within the scope of 28 U.S.C. 1605(a)(7).

In November 1990, Congress independently determined that Iraq had "repeatedly provided support for acts of international terrorism." Iraq Sanctions Act of 1990 (ISA), Pub. L. No. 101-513, § 586F(c)(1), 104 Stat. 2051. The ISA mandated application to Iraq of all "provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." *Ibid.*

3. On March 19, 2003, a United States-led coalition began military operations against the regime of Saddam Hussein. As military operations progressed, Congress and the President took various steps to promote the United States' critical interest in the prompt stabilization and reconstruction of Iraq, including by making available Iraq's own resources to rebuild its essential public services.

As particularly relevant here, in April of that year, Congress enacted the Emergency Wartime Supplemental Appropriations Act, 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559. EWSAA Section 1503 authorized the President to "suspend the application of any provision of the [ISA]" and further provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579.

On May 7, 2003, the President exercised his Section 1503 authority by "suspend[ing] the application of all of the provisions" of the ISA, with the exception of penalties for embargo violators, and "mak[ing] inapplicable with respect to Iraq section 620A of the [FAA] and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 3 C.F.R. 320 (2004). In a formal message to

Congress, the President specifically identified three statutes as among those made inapplicable to Iraq: the terrorism exception to immunity, "28 U.S.C. 1605(a)(7)," and two provisions relating to the execution of terrorism-related judgments against foreign state assets, "28 U.S.C. 1610, and Section 201 of the Terrorism Risk Insurance Act." *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647, 647-648 (May 26, 2003) (*Message to Congress*). The President observed that "[a] major national security and foreign policy goal of the United States" was "to ensure that * * * Iraqi resources * * * are dedicated for the well-being of the Iraqi people [and] for the orderly reconstruction and repair of Iraq's infrastructure." *Id.* at 647. He further explained that the entry or enforcement of judgments against Iraq would threaten "the national security and foreign policy of the United States" by "jeopardizing the full dedication of such assets to purposes benefitting the people of Iraq." *Ibid.*[1]

The President also took numerous other actions to ensure that Iraq's assets were available "to assist the Iraqi people and to assist in the reconstruction of Iraq." E.O. 13,290, 3 C.F.R. 192, 193 (2004) (vesting previously blocked Iraqi assets in the Department of the Treasury and directing their use to benefit Iraqis); see E.O.

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[1] On October 20, 2004, the Secretary of State rescinded Iraq's designation as a sponsor of terrorism. 69 Fed. Reg. 61,702. The Secretary observed that "nearly all the restrictions applicable to countries that have supported terrorism, including the application of 2[8] U.S.C. 1605(a)(7), were made inapplicable with respect to Iraq permanently in Presidential Directive No. 2003-23." *Ibid.* Nevertheless, the rescission was intended to strengthen "the partnership of the United States and Iraq." *Ibid.*

13,303, 3 C.F.R. 228, 228 (2004) (prohibiting any "judicial process" against the Development Fund for Iraq (DFI) and Iraqi petroleum products). The President explained that those steps were necessary because the "threat of attachment or other judicial process" against covered Iraqi assets "obstructs the orderly reconstruction of Iraq," and therefore "constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States." *Ibid.* The United States also worked through the United Nations to secure protections for Iraqi assets in other nations. See S.C. Res. 1483, U.N. Doc. S/RES/1483 ¶¶ 22, 23 (May 22, 2003) (granting "immunities equivalent to those enjoyed by the United Nations" to the DFI, Iraqi petroleum products, and other covered Iraqi governmental assets).

4. In *Acree* v. *Republic of Iraq*, 370 F.3d 41 (2004), cert. denied, 544 U.S. 1010 (2005), the District of Columbia Circuit ruled that the President lacked authority under EWSAA Section 1503 to make Section 1605(a)(7) inapplicable to Iraq. The majority described the question as "exceedingly close," but concluded that the authority conferred on the President did not encompass Section 1605(a)(7). *Id.* at 51. While acknowledging that a "straightforward" reading of the phrase "any other provision of law that applies to countries that have supported terrorism" includes Section 1605(a)(7), *id.* at 52 (quoting EWSAA § 1503, 117 Stat. 579), the majority held that Section 1503's authorization was implicitly limited to "obstacles to assistance and funding for the new Iraqi government," *id.* at 51. On the merits, the majority reversed the plaintiffs' nearly $1 billion judgment and dismissed for failure to state a claim. *Id.* at 58-60.

Then-Judge Roberts concurred in the dismissal, but on the jurisdictional grounds advanced by the United

States. *Acree,* 370 F.3d at 60. He observed that Section 1605(a)(7) is "on its face a 'provision of law that applies to countries that have supported terrorism,'" and he rejected the majority's inference of limitations circumscribing the President's authority. *Ibid.* He would have held "that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases." *Id.* at 63.

5. In December 2007, Congress passed a bill to amend the FSIA. The bill would have repealed 28 U.S.C. 1605(a)(7) and replaced it with a new terrorism exception to immunity, to have been codified as 28 U.S.C. 1605A. National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong., 1st Sess. § 1083(b)(1)(A)(iii) (H.R. 1585); *id.* § 1083(a)(1). The bill also would have created a new federal cause of action against foreign states for terrorism-related injuries and permitted prejudgment liens and punitive damages. *Ibid.* The bill would have permitted certain suits brought under Section 1605(a)(7)—including suits with final judgments, such as *Acree*—to be converted into suits under the new provision. *Id.* § 1083(c)(2).

Despite the fact that the bill contained defense authorizations during a time of war, the President declined to sign it because, by undoing judgments favorable to Iraq and subjecting Iraq to new liability, Section 1083 of H.R. 1585 "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States." *Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008,"* 43 Weekly Comp. Pres.

Doc. 1641, 1641 (Dec. 31, 2007) (*Return Memorandum*). Accordingly, the President withheld his approval of H.R. 1585. *Ibid.*

The Administration and Congress reached a compromise to address the President's concerns. Congress passed a revised bill adding a new provision authorizing the President to "waive any provision of [Section 1083] with respect to Iraq." National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. 343. That provision also expressed the sense of Congress that the Executive should work with Iraq "on a state-to-state basis to ensure compensation for any meritorious claims" that could not be heard due to the President's waiver. *Id.* § 1083(d)(4), 122 Stat. 344.

On January 28, 2008, the same day the President signed the amended bill into law, he exercised his full authority under Section 1083(d) by "waiv[ing] all provisions of section 1083 of the Act with respect to Iraq." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571.

6. Kenneth Beaty and William Barloon are American citizens taken hostage by the Hussein regime in the aftermath of the first Gulf War. 07-1090 Pet. App. 5a; *Daliberti* v. *Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001). Beaty, Barloon, and their wives sued Iraq pursuant to Section 1605(a)(7) and were awarded more than $10 million. *Id.* at 20, 26. Their children, respondents in No. 07-1090, sued Iraq in 2003, also pursuant to Section 1605(a)(7), for emotional distress resulting from their fathers' captivity. 07-1090 Pet. App. 9a. Iraq filed a motion to dismiss for lack of jurisdiction, which the district court denied on the basis of *Acree*. *Id.*

at 17a, 20a-22a. The court of appeals summarily affirmed. *Id.* at 1a.

7. Respondents in No. 08-539 sued Iraq pursuant to Section 1605(a)(7) for hostage-taking and torture during the first Gulf War. 08-539 Br. in Opp. 2-3. The district court dismissed their suits as untimely. 08-539 Pet. App. 2a, 38a-48a. While their appeal was pending, Congress enacted the NDAA. *Id.* at 2a.

The court of appeals rejected petitioners' argument that the NDAA's repeal of Section 1605(a)(7) eliminated jurisdiction, concluding that Section 1605(a)(7) remains a valid basis for jurisdiction over cases pending when Congress enacted the NDAA. 08-539 Pet. App. 6a-8a. The court observed that Congress limited application of the amendments in NDAA Section 1083 "to any claim arising under section 1605A." *Id.* at 9a (quoting NDAA § 1083(c)(1), 122 Stat. 342). The court reasoned that claims pending under Section 1605(a)(7) did not "aris[e]" under the later-enacted Section 1605A and therefore could proceed as before. *Ibid.* The court also relied on the NDAA's "transition rules" that specifically addressed "pending cases." *Id.* at 10a-12a. On the merits, the court of appeals reversed, holding that respondents' suit was timely. *Id.* at 19a.

SUMMARY OF ARGUMENT

1. In the midst of rapid and dramatic changes in the United States' foreign policy toward Iraq, Congress granted the President authority to "make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." EWSAA § 1503, 117 Stat. 579. The exception to immunity provided in 28 U.S.C. 1605(a)(7) falls within the plain text of that grant of au-

thority to the President, because Section 1605(a)(7) applies only to countries designated by the Secretary of State as supporters of international terrorism and therefore is unquestionably a "law that applies to countries that have supported terrorism."

The court of appeals in *Acree* declined to give effect to the expansive text of EWSAA Section 1503, instead imposing an atextual limitation narrowing the President's authority under Section 1503 to statutes restricting funding for the new Iraqi government. That construction, based on the erroneous premise that each of Section 1503's provisos was dependent on the Section's opening clause relating to the ISA, is flawed and would deprive Section 1503 of its full intended affect. But, even on its own terms, the court of appeals' analysis fails, because, as the President determined, the threat of enormous judgments against Iraq based on the Hussein regime's terrorist acts *do* pose a threat to adequate funding for the new Iraqi government.

Although the statute's plain text is sufficient to resolve the question presented, the court of appeals compounded its error by failing to defer to the President's reasonable construction of Section 1503. Deference to the President is especially appropriate here, because the authorities conferred in Section 1503 relate to the Nation's policy toward another country in the midst of military operations, and the President has independent constitutional authorities and institutional expertise in such matters.

2. Although each party invokes NDAA Section 1083 to support its arguments, that provision is irrelevant to the question presented. Because the President had already rendered Section 1605(a)(7) inapplicable to Iraq in 2003, and because he immediately waived application

of NDAA Section 1083 with respect to Iraq upon its enactment, the NDAA has no effect on the proper resolution in this case. In the event the Court finds the NDAA relevant, the better construction of Section 1083—which continues to apply to other countries that sponsor terrorism—is that it does not deprive the courts of jurisdiction over suits brought pursuant to the exception to immunity in Section 1605(a)(7) before the NDAA's enactment.

ARGUMENT

I. THE PRESIDENT MADE FSIA SECTION 1605(a)(7) INAPPLICABLE TO IRAQ PURSUANT TO EWSAA SECTION 1503

The President's *Message to Congress* informing it of his actions to protect covered Iraqi assets from judicial process states explicitly that "28 U.S.C. 1605(a)(7)" was among those provisions of law he made inapplicable to Iraq in the exercise of his authority under EWSAA Section 1503. 39 Weekly Comp. Pres. Docs. at 647-648. Although the *Acree* majority characterized the question whether the President's Section 1503 authority encompassed Section 1605(a)(7) as "exceedingly close," 370 F.3d at 51, it afforded the President's construction of the statute no deference whatsoever. Under well-established principles, however, courts must defer to the reasonable construction of an ambiguous statute by an executive agency responsible for implementing it. *A fortiori* courts must afford the President at least the same measure of deference. That is especially so when the statute in question concerns the Nation's foreign policy, where the President has independent constitutional authorities and institutional expertise.

While the *Acree* court's failure to afford the President deference makes its error particularly glaring, the court was incorrect even to regard the statute as ambiguous. Under the plain terms of EWSAA Section 1503, Section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," 117 Stat. 579, that the President was authorized to make inapplicable to Iraq. There is no basis to add limiting language beyond that used by Congress.

A. Under The EWSAA's Plain Terms, The President Had Authority To Render Section 1605(a)(7) Inapplicable To Iraq

1. Section 1605(a)(7) unquestionably qualifies as a "provision of law that applies to countries that have supported terrorism"

Section 1503 of the EWSAA contained several provisions addressing the web of sanctions that applied to Iraq because of the Hussein regime's sponsorship of international terrorism. That Section's opening clause authorized the President to "suspend the application of any provision of the [ISA]." 117 Stat. 579. The Section contains a number of additional provisions introduced by the word "*Provided*." *Ibid.* Section 1503's second proviso authorized the President to "make inapplicable with respect to Iraq section 620A of the [FAA] or *any* other provision of law that applies to countries that have supported terrorism." *Ibid.* (emphasis added). That provision unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries designated as state sponsors of terrorism. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever

kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)); *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (the "comprehensive phrase—'*any* property'"—is "broad and unambiguous"). Section 1605(a)(7) abrogated foreign sovereign immunity for certain claims against "a state sponsor of terrorism" designated under EAA Section 6(j) or FAA Section 620A. 28 U.S.C. 1605(a)(7)(A). Thus, under the plain statutory text, Section 1605(a)(7) was one of those provisions applicable to state sponsors of terrorism that EWSAA Section 1503 authorized the President to render inapplicable to Iraq.

The *Acree* majority believed that the relevant similarity between FAA Section 620A and the "other" provisions referred to in Section 1503's second proviso was imposition of "obstacles to assistance and funding for the new Iraqi Government." 370 F.3d at 51. But the text of the statute expressly provides a different test of similarity—namely, whether the other provision of law is one that "applies to countries that have supported terrorism." EWSAA § 1503, 117 Stat. 579. By its terms, Section 1503's second proviso authorized the President to render inapplicable any and all of the myriad of sanctions that applied to Iraq as a result of the Hussein regime's sponsorship of terrorism and that the President determined would frustrate the Nation's new policy goals for Iraq. There is nothing in the text of Section 1503 to suggest that Congress intended any of the existing sanctions imposed on Iraq as a sponsor of terrorism, with the exception of certain arms-related prohibitions, to be beyond the President's authority. Notably, many of those sanctions do not relate to "assistance" or "funding," including, in addition to Section 1605(a)(7), the prohibition on exports, 50 U.S.C. App. 2405(j), and the de-

nial of visas to Iraqi nationals, 8 U.S.C. 1735. The *Acree* majority's cramped construction would have the effect of erroneously excluding those provisions from the President's Section 1503 authority. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998).

The *Acree* majority's limitation of Section 1503 as encompassing only "obstacles to assistance and funding," 370 F.3d at 51, is particularly unwarranted given that Congress makes such limitations express when it intends them. In another statute, enacted just two months before the EWSAA, Congress specified that a provision easing restrictions on assistance to nongovernmental organizations was inapplicable "to section 620A of the [FAA] or any *comparable* provision of law *prohibiting assistance* to countries that support international terrorism." Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 196 (emphases added). See 22 U.S.C. 2152c(a)(4)(B)(i) (excepting "section 2371 of [Title 22] or any comparable provision of law prohibiting assistance to countries that support international terrorism"). The contrast between those statutory provisions and Section 1503 demonstrates that "Congress knows how to use more limited language along the lines of the [*Acree*] majority's construction when it wants to," but chose not to do so in the EWSAA. *Acree,* 370 F.3d at 60 (Roberts, J., concurring).

2. No canon of construction warrants imposing unstated limitations onto Section 1503

a. In support of its narrow construction of Section 1503, the *Acree* majority invoked an interpretive presumption that "where statutory language is phrased as a proviso, * * * its scope is confined to that of the principal clause to which it is attached." 370 F.3d at 52-53.

The court determined that Section 1503's several provisos were merely "responsive to a specific aspect of the ISA or other statutes that are implicated by the suspension authority" regarding the ISA in the section's opening clause. *Id.* at 53. Respondents urge a similar reading, contending that the opening clause of Section 1503 "reveal[s] the full intended scope of § 1503," and that the rest of Section 1503's provisions merely "explain *how* the President is to suspend [the ISA]." 08-539 Br. in Opp. 27. Such attempts to shoehorn each of the Section 1503 provisos into an ISA-centered framework cannot be squared with the text or purposes of Section 1503.

Although provisos are sometimes dependent on a preceding clause, this Court has observed that "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005). Section 1503 was such a provision. Whereas the opening clause of Section 1503 authorized the President to suspend sanctions imposed on Iraq in the ISA, other provisions removed, or authorized the President to remove, legal sanctions applicable to Iraq *independent* of the ISA.

Respondents' analysis of Section 1503's provisos as merely "explain[ing] *how* the President is to suspend" the ISA, 08-539 Br. in Opp. 27, cannot, for example, account for the fourth proviso in Section 1503, which provides that "section 307 of the [FAA] shall not apply with respect to programs of international organizations for Iraq." 117 Stat. 579. FAA Section 307 specifies certain countries, including at that time Iraq, as to which the United States will withhold funding for international programs. 22 U.S.C. 2227. FAA Section 307 is a free-standing sanction against the countries it specifies, independent of whether they have also been designated as

sponsors of terrorism. See Act of Apr. 30, 1994, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459. Thus, FAA Section 307's application to Iraq would not have been affected by the President's suspension of the ISA.

Like the fourth proviso, the second proviso in Section 1503 serves a function independent from that of the Section's opening clause. Even before the ISA's enactment, the Secretary of State had designated Iraq a sponsor of terrorism, which carried with it numerous sanctions, including those in FAA Section 620A and, after 1996, application of the FSIA's terrorism exception. Thus, without the second proviso, those sanctions that applied to Iraq due to the Secretary's designation would have remained, regardless of whether the President suspended the ISA under the opening clause. Clearly, Congress's purpose of removing the sanctions applicable to Iraq due to the Hussein regime's support of terrorism would have been frustrated if the EWSAA had not authorized the President to remove *both* the sanctions imposed directly under the ISA *and* those resulting from the Secretary's designation.

b. Even on its own terms, the *Acree* majority's analysis was flawed. The majority reasoned, 370 F.3d at 54, that Section 1503's second proviso was "responsive" to ISA Section 586F(c). Section 586F(c) mandated enforcement against Iraq of five enumerated statutes as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c)(1) and (2), 104 Stat. 2051. The court determined that the statutes specifically enumerated in Section 586F(c) "deal with restrictions on assistance to state sponsors of terrorism" and that its "all other provisions" language was implicitly limited to other statutes relating to re-

strictions on assistance. *Acree*, 370 F.3d at 55. The court then concluded that a similar limitation is implied in the "any other provision of law" language in EWSAA Section 1503. *Ibid.*

That reasoning is flawed in two basic respects. The first concerns the *Acree* majority's interpretation of Section 586F(c) itself. While that Section did not specifically mention Section 1605(a)(7), which did not exist when the ISA was adopted, Congress's use of broad "all other provisions" language in Section 586F(c) readily encompasses new sanctions against terrorist states adopted after the ISA's enactment, including Section 1605(a)(7). Section 1605(a)(7), by exposing Iraq to billions of dollars in liability, is as much an "economic sanction[]" on a state sponsor of terrorism, *Acree*, 370 F.3d at 54, as some of the statutes specifically enumerated in ISA Section 586F(c). See, *e.g.*, International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 555, 99 Stat. 227 (regarding civil aviation boycott on sponsors of terrorism). Thus, even if the catch-all clause in ISA Section 586F(c) were relevant to interpreting EWSAA Section 1503, the *Acree* majority was wrong to conclude that ISA Section 586F(c) did not encompass Section 1605(a)(7). But, in addition, even if the *Acree* majority's restrictive reading of the "all other provisions of law" language in ISA Section 586F(c) were a correct interpretation of *that* statute, it would in no way warrant importing that limitation into the second proviso in Section 1503, which does not cross-reference Section 586F and does not contain the same set of enumerated statutes as Section 586F(c).

In any event, Section 1605(a)(7) *is* a statute that "present[s] obstacles to * * * funding for the new Iraqi Government" and therefore satisfies the *Acree* ma-

jority's own reading of the scope of EWSAA Section 1503. 370 F.3d at 51. As his *Message to Congress* explained, the President concluded that the "threat of attachment or other judicial process" against covered Iraqi assets posed an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States" precisely because they "jeopardiz[e] the full dedication of such assets to purposes benefiting the people of Iraq," such as the "reconstruction and repair of Iraq's infrastructure" and "the costs of indigenous civilian administration." 39 Weekly Comp. Pres. Doc. at 647. The numerous other steps the President took to protect Iraqi assets from judicial process, see pp. 4-5, *supra*, further illustrate the centrality to the United States' policy goals toward Iraq in the immediate wake of the Hussein regime's removal of ensuring that Iraqi assets were utilized to stabilize Iraq. It was for this reason that the President singled out those statutes pertaining to the entry and execution of judgments against terrorist states, including FSIA Section 1605(a)(7), as among those he had rendered inapplicable to Iraq under EWSAA Section 1503. Thus, even under its narrowed reading of Section 1503, the *Acree* majority erred in refusing to defer to the President's determination that potentially billions of dollars in judgments would seriously undermine funding for the essential tasks of stabilizing and rebuilding Iraq.

c. Respondents raise two additional arguments for a narrow construction of EWSAA Section 1503. They contend that Section 1503 should not be read as authorizing the President to render FSIA Section 1605(a)(7) inapplicable to Iraq because Section 1503 was enacted as part of an appropriations bill, 08-539 Br. in Opp. 29-31, and because such a grant of authority would violate the

separation of powers, *id.* at 20-22. Neither argument is persuasive.

First, while respondents are correct that implied repeals of substantive laws are not lightly inferred from appropriations provisions, 08-539 Br. in Opp. 30, it is equally clear that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)). EWSAA Section 1503 itself says nothing about the appropriation or expenditure of federal funds, and certain of its provisions undeniably affect substantive provisions of law. See 117 Stat. 579 (regarding actions by United States representatives to international financial institutions). Other provisions of the EWSAA are also plainly substantive in nature. See, *e.g.*, § 2105, 117 Stat. 589 (amending 7 U.S.C. 6506 to permit labeling wild seafood as "organic").

Second, Congress's conferral on the President of authority to determine which sanctions to render inapplicable to Iraq, including the exception to foreign sovereign immunity in Section 1605(a)(7), raises no constitutional concerns. As this Court has noted, Congress may authorize the President to act "in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936). EWSAA Section 1503 conferred on the President authority regarding sanctions against Iraq at a time when the Nation's foreign

policy was undergoing rapid and dramatic transformation. In such circumstances, broad delegations to the President are particularly appropriate. *Id.* at 320-322.

Nor is it problematic, as respondents contend (08-539 Br. in Opp. 20-21), that Congress authorized the President to render inapplicable a jurisdictional provision. From the Nation's founding until the FSIA's enactment, jurisdiction over claims against foreign sovereigns depended entirely on determinations by the Executive Branch. See, *e.g.*, *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 36 (1945). A statute transferring back to the Executive Branch a narrow portion of that authority does not violate the separation of powers.

3. Temporal considerations do not justify departing from the EWSAA's plain text

The *Acree* majority also suggested that questions regarding EWSAA Section 1503's temporal application weighed against construing it to reach Section 1605(a)(7). 370 F.3d at 56-57. But those concerns were misplaced. The majority believed that Section 1503's sunset provision would render inoperative Presidential Determination 2003-23 and revive Section 1605(a)(7). *Id.* at 57. But the phrase "make inapplicable" in the second proviso of EWSAA Section 1503, 117 Stat. 579, connotes a *permanent* effect of the President's action. See H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) (noting that Presidential Determination 2003-23 had made terrorism-related laws "permanently inapplicable to Iraq"). Moreover, Section 1503's sunset provision provided that the President's "authorities" under that Section would expire, not that the President's *exercise* of those authorities within the requisite period would cease to have legal effect. When Congress wishes to eliminate

not only a grant of authority, but also the consequences of any valid exercise of that authority, Congress does so expressly. See, *e.g.*, Act of Oct. 25, 1999, Pub. L. No. 106-79, § 9001(a) and (c), 113 Stat. 1283 (providing for expiration of waiver authority and separately providing that "any waiver previously issued * * * shall cease to apply," upon the occurrence of a specified condition).

If the President's timely exercise of authority under Section 1503 ceased to have legal effect upon its sunset on September 30, 2005, then the ISA—which has never been repealed—would have once again become applicable to Iraq. But both the Executive and Congress have acted with the understanding that Presidential Determination 2003-23 continues to have effect. The Department of Commerce, for example, continues to permit export to Iraq of items that would not be permitted under the ISA if the President's exercise of his Section 1503 authorities had ceased to have effect upon the Section's sunset. See *Export and Reexport Controls for Iraq*, 69 Fed. Reg. 46,070 (2004).

Congress has likewise evidently understood that the President's exercise of his Section 1503 authorities did not cease to have effect. As noted, Congress never repealed the ISA. Congress did not believe such a repeal was necessary because the President's exercise of his Section 1503 authorities had already "ma[d]e *permanently inapplicable to Iraq* any provisions of law that apply to countries that support terrorism." H.R. Conf. Rep. No. 337, *supra*, at 59 (emphasis added).[2]

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[2] In contrast to the effect of the President's exercise of his authorities under Section 1503, Congress understood that the sanctions directly affected by EWSAA Section 1503, *i.e.*, the "laws referred to in [Section 1503's] fourth and fifth provisos," would have again become applicable to Iraq upon the Section's sunset, and Congress extended the

Nor, contrary to the *Acree* majority's suggestion (370 F.3d at 56), is it surprising that the President's exercise of his Section 1503 authority with respect to Section 1605(a)(7) would have an immediate effect on pending lawsuits against Iraq, in contrast to Section 1605(a)(7) itself, which provided that, when a country's designation was rescinded, courts would retain jurisdiction over claims that accrued during the time a country was designated. 28 U.S.C. 1605(a)(7)(A). As this Court has recognized, the decision to afford immunity to foreign sovereigns "reflects current political realities and relationships," and the courts therefore give effect "to the most recent such decision" by the political branches. *Republic of Austria* v. *Altmann,* 541 U.S. 677, 696 (2004). Given the seismic shift in the United States' political relationship with Iraq in early 2003, it is unremarkable that the specific decision to restore Iraq's immunity would be given immediate effect with respect to existing and prospective claims notwithstanding the general rule in Section 1605(a)(7)(A), rather than subject a new Iraqi government to crushing liability in our courts for the wrongs of the Hussein regime. Cf. Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(a)(1), 122 Stat. 3000 (rendering Sections 1605(a)(7) and 1605A immediately inapplicable to Libya upon receipt of funds sufficient to pay certain pending claims).[3]

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sunset date to ensure that those laws would remain inapplicable "through fiscal year 2005." H.R. Conf. Rep. No. 337, *supra*, at 59. See, *e.g.*, Act of May 11, 2005, Pub. L. No. 109-13, Div. A, § 2101, 119 Stat. 266 (amending FAA Section 307, 22 U.S.C. 2227, to delete Iraq from the list of states as to which the United States would withhold contributions to international organizations).

[3] When Congress enacted Section 1605(a)(7) in 1996, it likewise gave immediate effect to that change in policy by retroactively abrogating

B. Even If Section 1503 Were Not Clear, The President's Reasonable Construction Is Entitled To Great Deference

1. To the extent there is any doubt whether Section 1503 encompasses Section 1605(a)(7), the President has made clear his judgment that it does. The President fully exercised his Section 1503 authority in Presidential Determination No. 2003-23, in which he made inapplicable to Iraq FAA Section 620A "and any other provision of law that applies to countries that have supported terrorism." 3 C.F.R. at 320 (2004). In his formal *Message to Congress*, the President explicitly stated his conclu-

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the immunity of state sponsors of terrorism for all acts since their designations. Notably, Iraq was immune from respondents' claims in both Nos. 07-1090 and 08-539 at the time of their injuries. See *Nelson*, 507 U.S. at 362-363. When the United States' policy toward Iraq changed again, even more fundamentally, Iraq's immunity was restored and respondents were simply put back in the position they occupied at the time of their injuries.

Moreover, while reviving Iraq's immunity with respect to the exception in Section 1605(a)(7) means that respondents' claims cannot proceed in United States courts, their claims are not extinguished. Rather, terrorism-based claims have been returned to the realm of international diplomacy. Indeed, the United States and the Government of Iraq have recognized the desirability of resolving the claims of American nationals stemming from the Hussein regime's abuses. See Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Nov. 17, 2008, Art. 26(1)(b) <http://www.mnf-iraq.com/images/Cgs_Messages/security_agreement.pdf>. In connection with a United Nations Security Council resolution extending the immunity of certain Iraqi assets from attachment, Iraq's Prime Minister similarly represented Iraq's interest in taking "measures necessary to settle * * * claims inherited from the previous regime." See S.C. Res. 1859, Annex at 4, U.N. Doc. S/RES/1859 (Dec. 22, 2008) (reproducing Dec. 7, 2008, letter from Iraqi Prime Minister).

sion that both Section 1503 and the Presidential Determination encompass "28 U.S.C. 1605(a)(7)." 39 Weekly Comp. Pres. Doc. at 647-648.

Because Congress entrusted implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the *Acree* majority erred in failing to afford any deference to his construction of that provision. The majority recognized that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, 370 F.3d at 52, and believed that the case presented "an exceedingly close question," *id.* at 51. In such circumstances, as then-Judge Roberts observed, well-established principles of judicial deference to the Executive's construction of ambiguous statutes should make this "an easy case." *Id.* at 63-64 n.2 (concurring).

There is no sound basis to deny deference to the President's reasonable exercise of a statutory authority entrusted to him, especially in the foreign affairs context where the President generally enjoys great leeway under our Constitution and laws. This Court has frequently noted its "customary policy of deference to the President in matters of foreign affairs." *Jama* v. *ICE*, 543 U.S. 335, 348 (2005); see *Regan* v. *Wald*, 468 U.S. 222, 243 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981).

The Court has never addressed deference to Presidential construction of statutes within the specific framework of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), but it has made clear that *Chevron*-type deference is appropriate with respect to regulations adopted in the exercise of statutory authority conferred on the President and delegated by him. See *Wald*, 468 U.S. at 226 & n.2, 243 (deference to regulations issued by the

Office of Foreign Assets Control pursuant to statutory authority granted to President and delegated to OFAC); cf. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality, within the Executive Office of the President, "entitled to substantial deference" in its "interpretation of [the National Environmental Policy Act of 1969]," reflected in regulations adopted pursuant to Executive Order). There is simply no reason why the President's exercise of statutory authority granted him by Congress would receive less deference than the President's subordinates are shown when the President delegates authority to subordinate officers. That is especially so in the area of foreign affairs, in which the President enjoys considerable independent constitutional authority in addition to that granted to him by statute. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 424 & n.14 (2003).

2. Respondents contend (08-539 Br. in Opp. 23-25) that other actions by the President are inconsistent with his position that Presidential Determination 2003-23 reinstated Iraq's immunity from the claims at issue here. Those arguments misconstrue the other Presidential actions upon which respondents rely.

Respondents contend (08-539 Br. in Opp. 23-24) that there would have been no need for Executive Order 13,303, which prohibits and nullifies certain legal action against the DFI and Iraqi petroleum products, if the President had already reinstated the immunity of Iraq that had been abrogated by Section 1605(a)(7). But respondents overlook the FSIA's other immunity exceptions, which were unaffected by Presidential Determination 2003-23. See, *e.g.*, 28 U.S.C. 1605(a)(2) (commercial activity exception); 28 U.S.C. 1610(a)(2) (related attachment provision). Executive Order 13,303 protects cov-

ered Iraqi assets from attachment under the still-applicable provisions of the FSIA.

Respondents further contend (08-539 Br. in Opp. 24-25) that the President's reference, in his message returning the first version of the NDAA without his approval, to the threat posed "by foreclosing defenses on which Iraq is relying in pending litigation," *Return Memorandum*, 43 Weekly Comp. Pres. Doc. at 1641, reflects the President's understanding that Presidential Determination 2003-23 had not affected the application of Section 1605(a)(7). But H.R. 1585 expressly contemplated that even suits under Section 1605(a)(7) that had been dismissed, such as the *Acree* litigation, could be revived by moving to convert them into actions under the new exception to foreign sovereign immunity invoking the new federal cause of action. H.R. 1585, § 1083(c)(2). Thus, the President's reference to the threat posed by H.R. 1585's attempt to foreclose certain defenses, such as res judicata, was entirely accurate and in no way inconsistent with his view that Presidential Determination 2003-23 had validly rendered Section 1605(a)(7) inapplicable to Iraq.

II. THE NDAA HAS NO EFFECT ON THE COURTS' JURISDICTION OVER RESPONDENTS' CLAIMS

Both petitioners and respondents invoke the NDAA to bolster their arguments with respect to the continued availability of Section 1605(a)(7) as a basis for jurisdiction over Iraq. Because the President immediately waived application of the NDAA with respect to Iraq upon its enactment, the NDAA has no effect on the proper resolution of this case. To the extent the Court finds it relevant, however, the better construction of the NDAA is that it does not deprive the courts of jurisdic-

tion over suits brought pursuant to the exception to immunity in Section 1605(a)(7) before the NDAA's enactment.

A. The NDAA Has No Effect On The Courts' Jurisdiction Over Respondents' Claims Because The President Waived The NDAA With Respect To Iraq

Contrary to the parties' arguments, the NDAA has no effect on the courts' jurisdiction over respondents' claims. For the reasons stated above, the President's exercise of his authority under EWSAA Section 1503 had *already* permanently rendered Section 1605(a)(7) inapplicable to Iraq before the NDAA's enactment. To the extent NDAA Section 1083 purported to allow such claims to be asserted against Iraq under the newly enacted Section 1605A, the President's immediate exercise of his authority under NDAA Section 1083(d)(1) to waive application of Section 1083 to Iraq precludes that course as well. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571. Accordingly, there is presently no jurisdictional basis for asserting terrorism-based claims against Iraq.

Petitioners make a further argument (Pet. Br. 37-49) that, independent of the President's exercise of his authorities under EWSAA Section 1503, the courts now lack jurisdiction over respondents' claims because NDAA Section 1083(b)(1)(A)(iii), 122 Stat. 341, repealed Section 1605(a)(7). That contention is mistaken.

Because the President categorically waived its application to Iraq, NDAA Section 1083 has no effect at all on the legal status quo with regard to Iraq in place prior to the NDAA's enactment—that is, Section 1083 has no effect on the availability *vel non* of jurisdiction over respondents' claims against Iraq under Section 1605(a)(7).

The President immediately waived application to Iraq of "all provisions" of Section 1083—necessarily including both its adoption of the new 28 U.S.C. 1605A and its repeal of 28 U.S.C. 1605(a)(7)—pursuant to the authority specially granted to the President in response to his withholding of his consent to H.R. 1585. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571 ("waiv[ing] all provisions of section 1083 of the Act with respect to Iraq").

The President and Members of Congress who were the leading proponents of the NDAA reached a compromise to enable the rapid enactment of the NDAA. Under the compromise, it was understood that the President would exercise his waiver authority under Section 1083(d)(1), and claims against Iraq would be left in the same position as before H.R. 1585 passed Congress. The NDAA contained hundreds of pages of other time-sensitive national security and defense authorities. The compromise permitted the expeditious passage of the broader NDAA, days after Congress's return following the President's withholding of his approval of H.R. 1585, without the delay that would have accompanied consideration of whether or how to adjust the legal status quo with regard to Iraq. See 154 Cong. Rec. E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (President's exercise of his NDAA waiver authority would not affect "ongoing litigation" regarding the susceptibility of Iraq to suit "under current law").

B. NDAA Section 1083(c)(4)'s Characterization Of The Scope Of The President's Authorities Under EWSAA Section 1503 Is Entitled To No Weight

Like petitioners, respondents also rely on NDAA Section 1083, despite the President's waiver of that provision with respect to Iraq. Respondents cite (07-1090 Br. in Opp. 11; 08-539 Br. in Opp. 24 n.28) NDAA Section 1083(c)(4), which states that "[n]othing in section 1503 of [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of [the FSIA], or the removal of the jurisdiction of any court of the United States." 122 Stat. 343. Respondents' reliance on Section 1083(c)(4) is misplaced. Section 1083(c)(4) was adopted by a different Congress five years after the President exercised his authority under EWSAA Section 1503—well after Section 1503 had expired—and Section 1083(c)(4)'s application to Iraq was immediately waived by the President. It therefore should be afforded no weight in interpreting EWSAA Section 1503.[4]

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[4] Respondents in No. 08-539 contend (Br. in Opp. 31-35) that the Presidential waiver under NDAA Section 1083(d)(1) is inoperative because the original H.R. 1585, which had no waiver provision, became law. Because Congress's adjournment prevented the bill's return within the meaning of Article I, Section 7, Clause 2 of the Constitution, the President's withholding of approval constituted a "pocket veto." *Return Memorandum*, 43 Weekly Comp. Pres. Doc. at 1642. But even assuming that the President had the ability to return the bill without his approval under Article I, Section 7, Clause 2, he also properly effected a return veto. Respondents do not contest that the President returned the bill to the Clerk of the House of Representatives with his objections within ten days (excluding Sundays) of being presented with the bill. That is all the Constitution requires for a return veto. See U.S. Const. Art. I, § 7. Accordingly, H.R. 1585 did not become law, as both Congress and the President recognized in enacting the NDAA.

This Court has observed that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (citation omitted). Although later enactments substantively amending a law can affect the construction of other terms in the original statute, see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969), NDAA Section 1083(c)(4) did not amend EWSAA Section 1503 and the authorities contained in Section 1503 had in any event *expired* on September 30, 2005. See Act of Nov. 6, 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230. Section 1083(c)(4) therefore is merely a statement through which the 110th Congress sought to express its view about an already-expired statute enacted five years earlier by a different Congress. But even assuming that Section 1083(c)(4) as conceived had some substantive effect, it could not "establish[] * * * federal law" (07-1090 Br. in Opp. 7) because it applied only to Iraq and the President immediately waived it, along with the rest of Section 1083, as to Iraq.

If the Court were to give any credence to post-enactment history, it should instead look to the action of the same Congress that enacted the EWSAA. The President's *Message to Congress* informed Congress that Section 1605(a)(7) was among the provisions he had made inapplicable to Iraq under EWSAA Section 1503. 39 Weekly Comp. Pres. Doc. at 647-648. Later that year, the same Congress that enacted EWSAA Section 1503 extended the authorities contained in that Section for an additional year without expressing any disagreement with the President's action. Act of Nov. 6, 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230. Because Congress focused on Section 1503 when extending it, Con-

gress's failure to disapprove of the President's exercise of his authorities under that provision is "significant" and reflects the 108th Congress's understanding that the President acted within his statutory authority. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-601 (1983).

C. Although Rendered Inapplicable To Iraq, Section 1605(a)(7) Remains Available As A Basis For Jurisdiction Over Suits Against Other Designated States Pending Before The NDAA's Enactment

For the reasons explained above, NDAA Section 1083 does not affect the proper resolution of the question of jurisdiction over these suits against Iraq. The question of the NDAA's effect on pending cases does, however, arise with respect to suits against other designated states, as to which Section 1083's application has not been waived. To the extent the Court finds it helpful, in light of the parties' arguments, to understand how Section 1083 applies to such pending suits, the position of the United States is that the NDAA does not deprive the courts of jurisdiction over suits pending at the time of the NDAA's enactment pursuant to the immunity exception in Section 1605(a)(7).

1. Although petitioners invoke the "default rule" that jurisdictional repeals have immediate effect on pending cases, Pet. Br. 39, there is no need to resort to presumptions in this case. NDAA Section 1083 speaks directly to its "[a]pplication to [p]ending [c]ases." NDAA § 1083(c), 122 Stat. 342. Congress provided that, with respect to "[p]ending [c]ases," *ibid.*, "[t]he amendments made by this section shall apply to any claim arising under [28 U.S.C.] 1605A," § 1083(c)(1), 122 Stat. 342. Congress's use of the phrase "claim arising under sec-

tion 1605A," *ibid.*, is significant. It is well-established that "[a] suit arises under the law that creates the cause of action," *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), and the cause of action "arising under section 1605A" to which NDAA Section 1083(c)(1) refers, 122 Stat. 342, is the new federal cause of action created by 28 U.S.C. 1605A(c), NDAA § 1083(a)(1), 122 Stat. 339. Thus, under the plain text of NDAA Section 1083(c)(1), the amendment striking 28 U.S.C. 1605(a)(7) does not apply to pending cases brought under the immunity exception in Section 1605(a)(7) that do not assert the new federal cause of action in 28 U.S.C. 1605A(c).

Congress further specified that those plaintiffs with "[p]ending [c]ases" under the immunity exception in Section 1605(a)(7) who wished to invoke the benefits of Section 1605A had to move to convert their suits or file related actions under the new provision. NDAA § 1083(c)(2) and (3), 122 Stat. 342-343; §1083(c)(2)(C), (3)(A) and (B), 122 Stat. 343 (requiring that such motions or related actions be filed within specified periods after the NDAA's enactment or "the entry of judgment in the original action"). Congress did not, however, require every plaintiff with a pending suit under Section 1605(a)(7) to move to convert or file a related action under Section 1605A. It merely provided an option for plaintiffs who would find it advantageous, such as those who had "been adversely affected on the grounds that" federal law prior to the NDAA's enactment "fail[ed] to create a cause of action against the state," § 1083(c)(2)(A)(iii), 122 Stat. 342, and therefore wished to have their suit treated as though "the action had originally been filed under [the new cause of action in] section 1605A(c)," § 1083(c)(2), 122 Stat. 342-343;

§ 1083(c)(2)(B)(ii), 122 Stat. 343 (providing for waiver of defenses when a related action "is refiled under section 1605A(c)").

2. Petitioners' contrary arguments are not persuasive. Petitioners contend that application of the "default rule" that jurisdictional repeals have immediate effect on pending cases is appropriate with respect to NDAA Section 1083 because that provision both repealed the old immunity exception for state sponsors of terrorism and "simultaneously *replaced* it with a new jurisdictional provision that covers *every* pending Section 1605(a)(7) case." Pet. Br. 39, 41. But it would be very odd for Congress to require every plaintiff with a suit pending under a particular jurisdictional provision to refile simply because Congress gave that provision another section number, such as if 28 U.S.C. 1331 were redesignated 28 U.S.C. 1331A.

Here, though, Congress's amendment did more, which explains the refiling provision. The new Section 1605A combines an immunity exception, very much like the old one in Section 1605(a)(7), with numerous new substantive and procedural provisions, such as the creation of a new federal cause of action in Section 1605A(c). In that unusual situation, Congress understandably provided that only those plaintiffs with pending cases who chose to invoke the new cause of action under Section 1605A were required to take affirmative steps to convert or refile their actions. With respect to those plaintiffs with "[p]ending [c]ases" who chose not to assert a "claim arising under section 1605A," Congress provided that "[t]he amendments made by [NDAA Section 1083]" would not apply, NDAA § 1083(c)(1), 122 Stat. 342, and their suits would continue under the pre-

viously existing exception to immunity in Section 1605(a)(7).

Petitioners challenge that analysis as "nonsensical." Pet. Br. 45. Petitioners contend that, under that interpretation, NDAA Section 1083(c)(2)(A), which allows conversion of pending cases that were adversely affected by the prior absence of a federal cause of action, would not apply to the very cases it was intended to address because such plaintiffs did not assert causes of action under 1605A. *Ibid.* But petitioners are mistaken. Once a plaintiff in the circumstances described in Section 1083(c)(2)(A) files a motion to have his case treated as one "filed under section 1605A(c)," NDAA § 1083(c)(2), 122 Stat. 343, that plaintiff *has* raised a "claim arising under section 1605A," § 1083(c)(1), 122 Stat. 342, and the provisions of NDAA Section 1083 would apply to that motion.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 579, provides:

> The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall

submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

2. Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, 104 Stat. 2047, provides in pertinent part:

* * * * *

SEC. 586F. DECLARATIONS REGARDING IRAQ'S LONG-STANDING VIOLATIONS OF INTERNATIONAL LAW.

* * * * *

(c) SUPPORT FOR INTERNATIONAL TERRORISM.—(1) The Congress determines that Iraq is a country which has repeatedly provided support for acts of international terrorism, a country which grants sanctuary from prosecution to individuals or groups which have committed an act of international terrorism, and a country which otherwise supports international terrorism. The provisions of law specified in paragraph (2) and all other provisions of law that impose sanctions against a country which has

repeatedly provided support for acts of international terrorism, which grants sanctuary from prosecution to an individual or group which has committed an act of international terrorism, or which otherwise supports international terrorism shall be fully enforced against Iraq.

(2) The provisions of law referred to in paragraph (1) are—

(A) section 40 of the Arms Export Control Act;

(B) section 620A of the Foreign Assistance Act of 1961;

(C) sections 555 and 556 of this Act (and the corresponding sections of predecessor foreign operations appropriations Acts); and

(D) section 555 of the International Security and Development Cooperation Act of 1985.

* * * * *

SEC. 586G. SANCTIONS AGAINST IRAQ.

(a) IMPOSITION.—Except as provided in section 586H, the following sanctions shall apply with respect to Iraq:

(1) FMS SALES.—The United States Government shall not enter into any sale with Iraq under the Arms Export Control Act.

(2) COMMERCIAL ARMS SALES.—Licenses shall not be issued for the export to Iraq of any item on the United States Munitions List.

(3) EXPORTS OF CERTAIN GOODS AND TECHNOLOGY.—The authorities of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be used to prohibit the export to Iraq of any goods or technology listed pursuant to that section or section 5(c)(1) of that Act (50 U.S.C. App. 2404(c)(1)) on the control list provided for in section 4(b) of that Act (50 U.S.C. App. 2403(b)).

(4) NUCLEAR EQUIPMENT, MATERIALS, AND TECHNOLOGY.—

(A) NRC LICENSES.—The Nuclear Regulatory Commission shall not issue any license or other authorization under the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) for the export to Iraq of any source or special nuclear material, any production or utilization facility, any sensitive nuclear technology, any component, item, or substance determined to have significance for nuclear explosive purposes pursuant to section 109b. of the Atomic Energy Act of 1954 (42 U.S.C. 2139(b)), or any other material or technology requiring such a license or authorization.

(B) DISTRIBUTION OF NUCLEAR MATERIALS.—The authority of the Atomic Energy Act of 1954 shall not be used to distribute any special nuclear material, source material, or byproduct material to Iraq.

(C) DOE AUTHORIZATIONS.—The Secretary of Energy shall not provide a specific authorization under section 57b. (2) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)(2)) for any activity

that would constitute directly or indirectly engaging in Iraq in activities that require a specific authorization under that section.

(5) ASSISTANCE FROM INTERNATIONAL FINANCIAL INSTITUTIONS.—The United States shall oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d).

(6) ASSISTANCE THROUGH THE EXPORT-IMPORT BANK.—Credits and credit guarantees through the Export-Import Bank of the United States shall be denied to Iraq.

(7) ASSISTANCE THROUGH THE COMMODITY CREDIT CORPORATION.—Credit, credit guarantees, and other assistance through the Commodity Credit Corporation shall be denied to Iraq.

(8) FOREIGN ASSISTANCE.—All forms of assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 and following) other than emergency assistance for medical supplies and other forms of emergency humanitarian assistance, and under the Arms Export Control Act (22 U.S.C. 2751 and following) shall be denied to Iraq.

(b) CONTRACT SANCTITY.—For purposes of the export controls imposed pursuant to subsection (a)(3), the date described in subsection (m)(1) of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be deemed to be August 1, 1990.

* * * * *